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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/534,133	06/01/2005	Malcolm Tom McKechnie	102792-450 (10477P1)	2800

27389 7590 10/30/2008

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EXAMINER	
AHMED, HASAN SYED	

ART UNIT	PAPER NUMBER
1615	

MAIL DATE	DELIVERY MODE
10/30/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/534,133	MCKECHNIE, MALCOLM TOM	
	Examiner	Art Unit	
	HASAN S. AHMED	1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *22 July 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-8,10-15 and 19* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-8, 10-15, and 19* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

- Receipt is acknowledged of applicant's amendment and remarks, filed on 22 July 2008.
- The 35 USC 112 rejection of the previous Office action is withdrawn in view of the amendment.

* * * * *

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-8, 10-13, 15, and 19 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Lindauer (U.S. Patent No. 5,139,864) in view of Benko, et. al. (U.S. 2003/0091466).

Lindauer teaches a multilayer volatizable substance delivery article (*see* col. 2, line 62 – col. 3, line 18). The disclosed article is comprised of:

- a first phase consisting of a vaporizable agent (i.e. pockets of perfume material) as recited by instant claims 1 and 2 (*see* col. 9, lines 26-35, figure 11 (107));
- a second phase consisting of a second vaporizable material, as recited by instant claims 1 and 2 (*see* col. 9, lines 37-43; figure 11 (103));

- a third phase which constitutes a barrier between the first and second phases, as recited by instant claims 1 and 2 (*see* col. 9, lines 31-35; figure 11 (101);
- the commencement of vaporization of the second phase being delayed by the third phase and the flowing of the second phase around the third phase, as recited by instant claims 1 and 2 (*see* col. 7, line 65 – col. 8, line 4; figure 2);
- the shrinking of the third phase, as recited by instant claim 1 (*see* col. 7, line 65 – col. 8, line 4; figure 2);
- the third phase being the gel, as recited by instant claims 1 and 2 (*see* col. 9, line 37; figure 11 (101));
- the fragrance as recited by instant claim 11 (*see* col. 2, line 64);
- the insect repellant as recited by instant claim 12 (*see* col. 2, line 65);
- the third phase being the evaporable agent as recited by instant claim 13 (*see* col. 7, lines 64-68; figure 2); and
- the third phase being the gel whose volume reduces when exposed to air as recited by instant claims 1 and 2 (*see* col. 7, lines 64-68; figure 2);

Lindauer explains that a multilayer multifunctional volatizable substance delivery article is beneficial because it can deliver different substances (i.e. different aroma profiles) to the environment in a sequentially timed fashion (*see* col. 2, line 66 – col. 3, line 5).

The Lindauer reference differs from the instant application in that it does not teach the first or second phases to be liquid or gel phases.

Benko, et. al. teach an apparatus for releasing fragrance (*see* paragraph 0023). The apparatus may comprise multiple liquid or gel phases (*see* paragraph 0027, figure 3).

The Lindauer reference differs from the instant application in that it does not teach the partition wall of instant claim 1 or the limbs of instant claim 2. However, these limitations are deemed to be a matter of engineering design choice, and thus do not serve to patentably distinguish the claimed subject matter over the prior art. *In re Kuhle*, 526 F. 2d. 553, 188 USPQ 7 (CCPA 1975).

The Lindauer reference is silent with respect to the mixing or migrating of phases recited in instant claims 1 and 2, as well as the evaporation properties of instant claims 15 and 19. Applicant's article is the same as the prior art. It contains the same components in the same configuration. Properties are the same when the structure and composition are the same. Thus, burden shifts to applicant to show unexpected results, by declaration or otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed properties would have been present once the composition was employed in its intended use. *In re Best*, 195 USPQ 433.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make a vapor releasing article comprising a first phase, a second phase, and a third phase, which constitutes a barrier between the first and second phases, as taught by Lindauer, in view of Benko, et. al. One of ordinary skill in the art at the time the invention was made would have been motivated to make such an

article because it can deliver different substances (i.e. different aroma profiles) to the environment in a sequentially timed fashion, as explained by Lindauer.

* * * * *

Response to Arguments

Applicant's arguments filed on 22 July 2008 have been fully considered but they are not persuasive.

Applicant argues that the, "…device of the presently claimed invention only permits the second phase from evaporating once the first phase has substantially completely evaporated, thus allowing some evaporation of the third phase. There is minimal, if any, simultaneous evaporation of the first and second phases in the present invention" *See* remarks page 7.

Examiner respectfully submits that in the Lindauer invention, there is no simultaneous evaporation of the first and second phases because the second phase gel (located at the core of the article) will only be exposed to air when the outer first and third phases (which surround the second phase gel core) have evaporated (*see* col. 7, line 65 – col. 8, line 4; figure 2). As such, Lindauer reads on the instant application as claimed.

Applicant argues that, "…there will be significant simultaneous evaporation of all three phases for the remainder of the life of the device." *See* remarks, page 7.

Examiner respectfully disagrees. As explained above, the second phase gel (located at the core of the article) will only be exposed to air when the outer first and

third phases (which surround the second phase gel core) have evaporated (*see* col. 7, line 65 – col. 8, line 4; figure 2).

Applicant argues that, "...Lindauer does not suggest that it would have been useful, or even possible, to control vaporization rates." *See* remarks, page 7.

Lindauer teaches the commencement of the second phase being delayed by the third phase (*see* col. 7, line 65 – col. 8, line 4; figure 2). As such, the prior art suggests control of vaporization rates.

Applicant argues that Benko does not have a barrier between the first and second phases. *See* remarks page 7.

Examiner respectfully submits that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.,* 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Benko was invoked for the limited teaching of an apparatus comprising multiple liquid or gel phases (*see* paragraph 0027, figure 3).

Applicant argues that the second phase, "...evaporates on a random basis once the mixed once the mixed first and third phases have randomly evaporated sufficiently to expose the second phase to the air." *See* remarks, page 8.

Examiner respectfully submits that the second phase does not evaporate randomly, rather, it only evaporates after the first and third phases have evaporated, thus exposing the second phase in a rate controlled manner (*see* col. 7, line 65 – col. 8, line 4; figure 2).

* * * * *

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to HASAN S. AHMED whose telephone number is (571)272-4792. The examiner can normally be reached on 9am - 5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael P. Woodward can be reached on (571)272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/H. S. A./
Examiner, Art Unit 1615

/Humera N. Sheikh/
Primary Examiner, Art Unit 1615